DOES CARMACK PREEMPTION APPLY TO CROSS-BORDER SHIPMENTS?

3.5.14

Since more and more TIA members are involved with, or interested in, brokering shipments into Canada from US, or from Canada to US, I believe that this essentially preemption case is instructive regarding the application of Carmack to such shipments. See *Atlas Aerospace LLC* v. *Advanced Transportation, DMG Canada, BRK Specialized, Inc., Redmond Associates Machinery Movers*, US Dist. Ct. LEXIS 58378(2013). The case is also interesting because it seems to suggest that contrary to general thinking the application of Carmack is NOT dependent on which side of the border the cargo damage occurs.

According to the court's Memorandum and Order, Plaintiff, Atlas Aerospace hired Advanced Transportation (a property broker), to transport a machine from Ontario, Canada to Wichita, KS. Thereafter, Advanced hired BRK to physically transport the Machine to destination. When the machine arrived in KS , it was found to be damaged. Plaintiff Atlas, claimed damages for repairs and lost profits on the theory of breach of contract and negligence against BRK. Defendant BRK sought dismissal of state law claims alleging that they were preempted by Carmack. Plaintiff argued that Carmack did not apply to shipments by motor carrier that originated from a foreign country and were delivered in the US, citing 49 USC section 13501 which provides, in relevant part, " . . . that the Secretary of Transportation has jurisdiction over transportation by motor carrier to extent that property is

transported between a place in the US and a place in a foreign country to the extent that transportation is in the US."

In *Atlas*, the US District Court in Kansas observed that the word, "between" would include shipments moving in either direction. Plaintiff argued that section 13501 applied only to shipments from the US to a foreign country, but not in the reverse direction. Previously, the US Supreme Court *Kawasaki Kaisha Ltd.* v. *Regal-Beloit Corp*. 130 US 2433 (2010), noted that the recodification of Carmack retained its pre-1978 scope and, thus, section 13501 only applied to shipments originating in the US and thereafter transported to a foreign country. (One-way application of Carmack.)

The Kansas Court pointed out that in *Kawasaki*, the shipment originated in China , was travelling on a through bill of lading, and was subject to COGSA (*Carriage of Goods by Sea Act*) and that Carmack did not apply to the rail leg of the shipment in the US where the damage occurred. Citing other US Supreme Court precedents, the Kansas Court in *Atlas* observed that there was no authority which extended Carmack to cargo which originated overseas and travelled under a through bill of lading to the US. The court relied on the 2d Circuit case, *Sampo Japan Ins. Co. of America* v. *UP Railroad*, 456 F 3rd 54 (2d Cir 2006), which was overruled by *Kawasaki* , which stated that the US Supreme Court did not rule on the meaning of the word "between" as used in section 13501, so that the Second Circuit's analysis (citations) was persuasive, **holding that the scope of Carmack included shipments transported between US and Canada in either direction.** In so holding, the Kansas District Court dismissed, as preempted, the state law claims (negligence) asserted by Plaintiff,

but allowed it to amend its complaint in order to assert Carmack liability.

In the published opinion, *Atlas Aerospace LLC* v. *Advanced Transportation Inc., et al.*, US Dist. LEXIS 58378 (2013), the Kansas District Court held that state law claims, against Advanced (the broker) were not preempted by Carmack (49 USC 14706). Advanced argued that Plaintiff's tort claims should be pre-empted under 49 USC 14501 (c) which provides, " . . . a state may not enact or enforce law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier, . . . broker, or freight forwarder with respect to the transportation of property." The court, while apparently agreeing with Advanced regarding tort claims, refused to dismiss the contract claims asserted by Plaintiff.

While the US District Court in Kansas provides an instructive opinion, *i.e.*, that Carmack applies to cross-border shipments between US and Canada travelling in either direction, the court did not address whether it is required to establish that the cargo damage which would otherwise be subject to a Carmack claim, actually occurred in the US. The application of the sections 13501 and 14706 is not dependent on the place where damage occurred. The jurisdictional statute 49 USC section 13501 (E) applies, ". . . to the extent the transportation is in the United States." But what if the damage occurred in Canada or Mexico? What if the parties do not know where the damage occurred ? Would Carmack still apply?

Based on the *Atlas* case, once jurisdiction is established, Carmack, 49 USC 14706, takes over and deals with the liability of carriers for

freight damage and states in relevant part that freight forwarders and carriers are liable as follows: ". . . The liability imposed under this paragraph is for the actual loss or injury to the property caused by, (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in a foreign country when transported under a through bill of lading . . . ." (Emphasis added.) Sub (C) provides shippers a right of action against an **intermediate carrier.** Under the wording of Sub(C), it appears that Carmack will only apply to outbound, US to Canada shipments transported by an intermediate carrier, not the receiving or the delivering carrier.

Based on the language of section 14706, it can be argued that liability is not dependent on the place where the damage occurred, but rather on who actually caused it. Thus, if at least some of the transportation takes place in the US, providing jurisdiction of DOT (and US courts) under section 13501, then the parties may proceed with a Carmack claim with its proof requirements as to both claimants and defendant carriers. Whether the proof requires that the cargo damage occur within US borders is not answered by the *Atlas* decisions.

However, at least two other courts have dealt with the issue, and reached opposite conclusions. *Tempel Steel Corp. v. Landstar Inaway, Inc.,* 211 F 3rd, 1029, (7th Cir. Ct. App 2000) involved the shipment of a large machine from Ohio to Mexico transported under a through bill of lading. During transport in Mexico the machine was severely damaged by a Mexican drayage carrier. Tempel Steel sued Landstar for cost of repairs $300,000.00, alleging liability under Carmack. Landstar claimed Carmack did not

apply because the accident/damage occurred in Mexico. The 7th Circuit Court upheld the district court, finding that Landstar was liable under Carmack and that if Landstar wanted to limit its liability it could have used two bills of lading, one from Ohio to the US Customs at the border; and, one from Mexican customs to destination in Mexico.

Another case on point is *Northern Marine Underwriters v. FBI Express, Freight Brokers Inc. and Jamco*, 2009 U.S. Dist. LEXIS 126741. Here, the US District Court in Texas dealt with a shipment of 262 rolls of fabric from South Carolina into Mexico valued at $140,000.00. The shipment was transported under a through bill of lading. The fabric was stolen in Mexico. Defendant Jamco, as well as FBI, claimed that Carmack did not apply because the loss occurred outside the US. Plaintiff claimed it made out a *prima facie* case under Carmack. The court citing, 49 USC 13501 (E), ". . . To the extent transportation is provided in the United States . . . .," interpreted the statute to mean Carmack applied only to shipments (and, by implication, damage) within the US, thus ruling in favor of Defendants.

In summary, with respect to the preemption issue, the *Atlas* decision teaches that federal preemption will bar state law negligence claims against carriers regarding the cross-border nature of the shipments. The *Tempel* and *Northern Marine* cases conclude that before one can assert preemption as a defense on behalf of carriers, it first must be established that Camack in fact applies, and that while the *Northern Marine* case, included a broker as a defendant, the court did not deal with pre-emption as a defense for brokers under 49 USC 14501 (c) in the cross-border context.

(Note: Underlinings are for intended emphasis by the writer and do not appear in the published court opinions.)

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